

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04

Date: 10 December 2008

**PRE-TRIAL CHAMBER I**

**Before: Judge Anita Ušacka, Single judge**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**Public**

**Decision on the request of the Legal Representative of applicants a/0221/06, a/0224/06, a/0225/06, a/0226/06, a/0229/06, a/0230/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06 and a/0240/06 concerning access to the unredacted version of the "OPCD Observations on 28 Victim Applications" and the opportunity to respond**

**Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**  
Mr Luis Moreno Ocampo  
Ms Fatou Bensouda

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**  
Mr Joseph Keta

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**  
Ms Paolina Massida, Principal Counsel

**The Office of Public Counsel for the Defence**  
Mr Xavier-Jean Keita

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**  
Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Victims and Witnesses Unit**

**Victims Participation and Reparation  
Section**

**Other**

**I, Judge Anita Ušacka, judge at the International Criminal Court (the “Court”);**

**NOTING** the “*Rapport sur des informations supplémentaires et renouvellement de demandes considérées incomplètes a/0004/06, a/0005/06, a/0006/06, a/0039/06, a/0049/06, a/0050/06, a/0073/06, a/0076/06, a/0078/06, a/0079/06, a/0110/06, a/0144/06, a/0155/06, a/0157/06, a/0160/06, a/0203/06, a/0221/06, a/0224/06, a/0225/06, a/0226/06, a/0227/06, a/0229/06, a/0230/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06, a/0240/06*”<sup>1</sup> filed confidential, *ex parte* – Registry only, by the Registry on 19 August 2008;

**NOTING** the “*Renouvellement des demandes de participation a/0004/06, a/0005/06, a/0006/06, a/0039/06, a/0049/06, a/0050/06, a/0073/06, a/0076/06, a/0078/06, a/0079/06, a/0110/06, a/0144/06, a/0155/06, a/0157/06, a/0160/06, a/0203/06, a/0221/06, a/0224/06, a/0225/06, a/0226/06, a/0227/06, a/0229/06, a/0230/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06, a/0240/06*”<sup>2</sup> filed confidential by the Registry on 20 August 2008;

**NOTING** the “*Prosecution’s Observations on the Re-submission of Applications a/0004/06, a/0005/06, a/0006/06, a/0039/06, a/0049/06, a/0050/06, a/0073/06, a/0076/06, a/0078/06, a/0079/06, a/0110/06, a/0144/06, a/0155/06, a/0157/06, a/0160/06, a/0203/06, a/0221/06, a/0224/06, a/0225/06, a/0226/06, a/0227/06, a/0229/06, a/0230/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06, a/0240/06*”<sup>3</sup> filed by the Prosecution on 22 September 2008;

**NOTING** the “*OPCD Observations*”<sup>4</sup> filed confidential by the Office of Public Counsel for the Defence (“the OPCD”) on 22 September 2008;

<sup>1</sup> ICC-01/04-532-Conf-Exp; ICC-01/04-532-Conf-Exp-Anx1-28.

<sup>2</sup> ICC-01/04-533-Conf.

<sup>3</sup> ICC-01/04-539.

<sup>4</sup> ICC-01/04-540-Conf.

**NOTING** the “Public Redacted Version of OPCD Observations on 28 victim applications”<sup>5</sup> filed by the OPCD on 15 October 2008;

**NOTING** the “*Requête en notification de la version non expurgée de la « Public Redacted Version of the OPCD Observations on 28 victims applications » et en droit de réponse auxdites Observations*”<sup>6</sup> filed by the Legal Representative of applicants a/0221/06, a/0224/06, a/0225/06, a/0226/06, a/0229/06, a/0230/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06, a/0240/06 (“the Legal Representative”) on 29 October 2008 and notified to the Chamber on 30 October 2008;

**NOTING** the “Prosecution’s Response to the Request of Legal Representative of applicants a/0221/06, a/0224/06, a/0225/06, a/0226/06, a/0229/06, a/0230/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06 and a/0240/06, entitled “*Requête en notification de la version non expurgée de la ‘Public Redacted Version of the OPCD Observations on 28 victims applications’ et en droit de réponse auxdites Observations*”<sup>7</sup> filed on 21 November 2008;

**NOTING** article 68 of the *Rome Statute* (“the Statute”), rules 85, 89, 90, 91 and 92 of the *Rules of Procedure and Evidence* (“the Rules”), and regulation 86 of the *Regulations of the Court* (“the Regulations”);

**NOTING** articles 12, 13, 16, 26, 31, and 34 of the Code of Professional Conduct for Counsel (“the CPCC”);

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<sup>5</sup> ICC-01/04-542.

<sup>6</sup> ICC-01/04-544.

<sup>7</sup> ICC-01/04-550.

**CONSIDERING** that in his submission of 30 October 2008, the Legal Representative submits that he, as Legal Representative, has been "*directement mis en cause aux termes des Observations*", but that the redactions in the public version of the document prevent him from understanding which aspect of his function or role is being questioned, as well as from responding to the arguments of the OPCD;<sup>8</sup>

**CONSIDERING** that the Legal Representative also submits that the Observations impugn the circumstances under which the applications pending before the Single Judge were completed, and therefore implicate the integrity of the applications as well;<sup>9</sup>

**CONSIDERING** that in the view of the Legal Representative, in accordance with the legal provisions and rules applicable before the Court, as well as applicable fundamental principles of law, the Legal Representative should be given the opportunity to be heard on the subject of the OPCD's submissions in accordance with regulation 24(2) of the Regulations;<sup>10</sup>

**CONSIDERING** that the Legal Representative requests, first, to be given access to the unredacted version of the OPCD observations containing information regarding the Legal Representative and the applicants he represents, and second, to be afforded the right to respond to the submissions concerning himself and the applicants he represents;<sup>11</sup>

**CONSIDERING** that, in the view of the Prosecution, the Legal Representative should be put in a position to be able to respond to the allegations of "the existence

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<sup>8</sup> ICC-01/04-544, para. 1.

<sup>9</sup> ICC-01/04-544, para. 3.

<sup>10</sup> ICC-01/04-544, paras. 5-6.

<sup>11</sup> ICC-01/04-544, para. 14.

of a potential conflict of interest”, as the nature of the allegations requires their full disclosure to the Legal Representative in order to enable him to respond properly;

**CONSIDERING** that the OPCD did not comply with regulation 23*bis*(1) of the Regulations<sup>12</sup> in that it did not state the factual and legal basis for the filing of its observations under the “confidential” classification;

**CONSIDERING** that, nevertheless, in the view of the Single Judge, the retention of the “confidential” classification is necessary with respect to this set of observations in order to sufficiently protect the identities of the applicants and intermediaries from disclosure to the public;

**CONSIDERING** that although some of the OPCD’s observations pertain to applications submitted by applicants who are not represented by the Legal Representative, paragraphs 11 to 13 pertain only to the Legal Representative himself, and therefore the notification of the unredacted version of these paragraphs to the Legal Representative will not negatively affect the protection of the identities of the applicants and intermediaries;

**CONSIDERING** that, in the view of the Single Judge, in this particular instance, because of the nature of the OPCD’s observations pertaining to the Legal Representative, it would be appropriate for the Legal Representative to have full access to paragraphs 11 to 13 of the OPCD’s observations;

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<sup>12</sup> Regulation 23*bis* (1) provides, “Any document filed by the Registrar or a participant and marked ‘ex parte’, ‘under seal’ or ‘confidential’, shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings.”

**CONSIDERING**, however, that the CPCC, particularly articles 31, 33 and 34, outline the mechanism under which “any person or group of persons whose rights or interests may have been affected”<sup>13</sup> may submit direct allegations of misconduct by counsel to the Registrar,<sup>14</sup> who must then transmit the complaint to an independent Commissioner appointed by the Presidency;<sup>15</sup>

**CONSIDERING** that, in the view of the Single Judge, in contrast to the allegations raised in connection with a legal representative’s continued representation of victims in the confirmation hearing in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,<sup>16</sup> the OPCD does not ask the Single Judge to limit the Legal Representative’s continued representation of the applicants,<sup>17</sup> but submits observations only in connection with the OPCD’s views on the applications currently pending before the Single Judge;

**CONSIDERING**, therefore, that the Single Judge will take the aforementioned submissions of the OPCD into account only to the extent to which, in the view of the Single Judge, they bear on the applications pending before her, and will not consider them as direct allegations against the Legal Representative in his capacity as a representative of victim applicants and victims who have previously been granted procedural status in the proceedings;

**CONSIDERING** that, as noted by both the Legal Representative<sup>18</sup> and by the Prosecution,<sup>19</sup> both the jurisprudence of the Chamber<sup>20</sup> and regulation 24 of the Regulations are clear that the Legal Representative may file a response when the

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<sup>13</sup> Code of Professional Conduct for Counsel, art. 34(1)(c).

<sup>14</sup> Code of Professional Conduct for Counsel, art. 34(1).

<sup>15</sup> Code of Professional Conduct for Counsel, arts. 34(3) and 33(1).

<sup>16</sup> ICC-01/04-01/07-T-39-ENG CT WT, p. 19, line 16 to p. 20, line 22.

<sup>17</sup> ICC-01/04-540-Conf, para. 51.

<sup>18</sup> ICC-01/04-544, para. 12.

<sup>19</sup> ICC-01/04-550, para. 5, note 8.

<sup>20</sup> ICC-01/04-164, pp. 2-3.

victims he represents are permitted to participate in the proceedings under article 68(3) of the Statute;

**CONSIDERING** that despite the fact that the applicants represented by the Legal Representative have not yet been granted the right to participate under article 68(3) of the Statute and thus the Legal Representative is not entitled to respond on that basis, the Single Judge is nevertheless of the view that, in keeping with the principle of fairness and in order to allow her to make an informed, well-reasoned decision on the applications pending before her, it would be appropriate to permit the Legal Representative to respond to those allegations that specifically concern him;

**FOR THESE REASONS**

**ORDER** the OPCD to file, at the latest, on 12 December 2008 at 16:00 hours, an unredacted version of paragraphs 11 to 13 of the OPCD observations on a confidential basis, available only to the Prosecution, the OPCD and the Legal Representative of applicants a/0221/06, a/0224/06, a/0225/06, a/0226/06, a/0229/06, a/0230/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06 and a/0240/06;

**GRANT** the request of the Legal Representative to respond to the observations contained in paragraphs 11 to 13 of the OPCD's observations;

**DECIDE** to give the Legal Representative until 9 January 2009 at 16:00 hours to file such response;

**REJECT** the request of the Legal Representative to respond to the observations of the OPCD in all other respects.

Done in both English and French, the English version being authoritative.



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**Judge Anita Ušacka**  
**Single judge**

Dated this Wednesday, 10 December 2008  
At The Hague, The Netherlands